No. 452

SEP 20 1940

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 7228.

CHARLES A. McCULLOCH, Farmer-Debtor.
No. 505. In Bankruptcy.

CHARLES A. McCULLOCH, Appellant,

versus

WILBUR L. LOFTUS, - Appellee.

DECISION ENTERED JULY 2, 1940.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CHARLES A. McCULLOCH,
Petitioner.

WESTERFIELD-GOETZ CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 7228.

CHARLES A. MCCULLOCH, *Petitioner,*

v.

WILBUR L. LOFTUS.

To the Members of the United States Supreme Court:

The undersigned petitioner makes this verified plea to Your Honors, praying that he be granted the benefits of a writ of certiorari in the above-cited litigation, transferring the record in said cause from the United States Circuit Court of Appeals, Seventh Circuit, Chicago, Illinois, for review by the United States Supreme Court, alleging:

1. A constitutional question involved; and

2. Manifest and irreparable injustice done by decisions in lower courts as disclosed by statements of fact as follows, to-wit:

The decisions objected to make a distinction between large farmers and small farmers which deny to petitioner his rights under the Constitution of the United States.

Manifest and irreparable wrong and injury has been visited upon petitioner by permitting more than

two years to elapse, involving petitioner in great expense and material loss from accruing interest and penalizing taxes, including an appeal, No. 6500, to the United States Circuit Court of Appeals, Seventh Circuit, fully established by the record, and for emphasis recited herein as follows, to-wit:

Your petitioner believes that rulings entered in lower courts have been guided by the fact that important matters involved in the case at bar have never been before the Supreme Court which ought to be ruled upon by the court of last resort. (Rule 38, Par. 5, letter (b).)

To shorten petitioner's recital of facts believed to be important he prays the Court to consider a copy of a letter dated October 21, 1939, addressed by his attorney to Hon. William Lemke, M. C., as follows, to-wit:

"New Albany, Ind., October 21, 1939.

Hon. William Lemke, M. C.,
House Building,
Washington, D. C.

Re: In Bankruptcy.
Charles A. McCulloch,
Farmer Debtor.

Loftus vs: McCulloch. Petition raising question as to jurisdiction. Involving status of debtor as farmer.

"Dear Mr. Lemke:

"I gratefully recall correspondence with yourself, approximately two years ago, relative to

cause No. 505, above cited, and your valued aid in furnishing illuminating literature as to operation of the Frazier-Lemke Act of the Congress, but more particularly to your generous offer to be of assistance to my client, if needed, in the matter of an appeal which had been taken from a decision of the United States District Court for the Southern District of Indiana, New Albany Division, which had been entered in that court October 20, 1937, to the Circuit Court of Appeals, Seventh Circuit, Chicago, Illinois.

"I felt very thankful that in that proceeding it did not become necessary to invoke your assistance because while the question on appeal in our case was pending before the Circuit Court the United States Supreme Court handed down a decision in the case of Wright vs: Union Central Life Insurance Company, 304 U. S. 502, 58 S. Ct. 1025, disposing of the question at issue and the Circuit Court reversed our District Court in our case and ordered the same remanded for further proceedings.

"One of McCulloch's secured creditors was the New Albany National Bank, now in liquidation, and after the decision referred to the Receiver obtained from the Department in Washington authority to sell said loan and the same was sold and transferred to Wilbur L. Loftus, he being the highest bidder. This transaction occurred, towit, June 9, this year and shortly thereafter Loftus filed a petition in our District Court, attacking the status of McCulloch as a farmer within the purview of the Frazier-Lemke Act.

"The Loftus petition was referred by Judge Baltzell to Wilmer T. Fox of Jeffersonville, Indiana, as a Special Master, June 27, 1939, and directed said Fox to take testimony concerning the case and to report said testimony with his findings of fact and conclusions of law thereon to the Court.

"July 21, 1939, said Wilmer T. Fox as such Special Master took and heard the evidence given in behalf of said petitioning creditor and of said debtor and caused the same to be reported and embodied in a transcript thereof.

"September 8, 1939, said Special Master filed in the office of the Clerk of the United States District Court for the Southern District of Indiana, New Albany Division, his Master's report, finding for the petitioning creditor and expressing the opinion that McCulloch does not qualify as a farmer.

"Monday, October 16, 1939, Judge Baltzell approved the report of the Special Master in Chancery and confirmed the same. Verbal notice of appeal was given by me to Judge Baltzell and written notice under date of October 18, 1939, has been entered.

"Now, Mr. Lemke, I am taking the liberty of writing this rather full letter to you because I believe that the administration of the Frazier-Lemke Act in a broad and comprehensive manner is at issue, involving the status of the small farmer, and if you agree with me that the act in question was never intended to discriminate between the owner of a large farm and a farmer who owns, and operates, one, or more, small farms, I invite your active interest and co-operation in behalf of Mr. McCulloch.

"I recite some facts, believed to be pertinent, in order that your counsel, when furnished, shall be based upon such knowledge, and should you desire fuller information I shall be at your command and shall gladly supply the facts if within my power to do so.

"Mr. McCulloch is a sufferer from rheumatism, seriously affecting the sciatic nerves, and is at the present time confined to his bed. He is at no time active, cannot follow the plow or make a hand in wheat or hay harvest. He is generally able to assist in milking, feed the chickens, slop the hogs and hoe some in the garden.

"He is the owner in fee of a 14 acre tract of farming land, unimproved, which he rents to a share-cropper; a 33 acre tract of land, improved by a valuable dairy-barn, which he rents for dairying purposes for a cash rental; and shares with other heirs the ownership of an improved farm of 35 acres, occupied by sisters, from which he derives no income. He resides with his wife and two small sons on a 10 acre farm, owned by his wife, which furnishes the chief source of the living for himself and family.

"It is admitted that his urban holdings of real estate, partly improved property but chiefly unimproved and non-income producing, exceed in potential value his farm lands, but the principal part of his income is derived from his farming properties, and he actually resides upon and manages his wife's ten acre tract.

"At the hearing July 21, 1939, not one word of testimony that McCulloch is not a farmer was offered by plaintiff other than the testimony of the

debtor, whom they called as their first witness and who recited the foregoing facts, while we introduced 15 to 20 dirt farmers, many of them McCulloch's near neighbors and all of them persons of intelligence and probity, who testified that debtor's chief occupation has always been, and is now, farming. Attorneys for petitioner challenged all witnesses introduced by debtor on the ground that they did not qualify as experts, objection being noted, but each was allowed to testify, all were cross-examined by petitioner's attorneys, and in nearly every instance the cross-examination strengthened their testimony. We could easily have produced fifty witnesses to prove that McCulloch is a farmer but the Special Master impatiently objected that we were needlessly furnishing cumulative proof, though notwithstanding this o'erwhelming testimony he took the view of the counsel for petitioner that McCulloch is primarily a dealer in real estate and does not qualify as a farmer under the Frazier-Lemke Act, and Judge Baltzell confirmed this opinion. As a matter of fact neither the Special Master nor the Judge needed, or regarded, any proof submitted at this alleged hearing of the matter, both having determined this matter in their own minds before entering upon the proceedings, as clearly indicated by marked discourtesy to the debtor by the Special Master, which, seemingly, he sought to efface by special courtesy to myself. It is not in the record but when the Special Master, in person, delivered to me at my office a copy of his finding of facts and opinion, he commented that I should have sought to prove that McCulloch is a farmer by calling lawyers to testify as to that fact. By such

logic dentists would be the proper persons to call to prove that a man is a blacksmith; grocers to prove that a man is a huckster; and debutante and dowager socialites to prove that a mule was sired by a jack ass. An absurd system of logic.

"We stressed the United States Supreme Court's decision, written by Justice Cordozo, in the case of the Bank v. Beach wherein the Court used the words 'Beach is a farmer or he is nothing' and the conclusion naturally reached, and announced, therein completed the syllogism finding Beach to be a farmer. We proposed the syllogism 'McCulloch is a farmer or he is nothing. He certainly is something. Therefore he is a farmer.' Singularly enough, the attorneys for the petitioning creditor invoked the same case, citing it as coming within the purview of the Frazier-Lemke Act because of the extensive acreage involved.

"It is probably true that it will be hopeless for McCulloch to attempt to discharge his indebtedness by sale of the products of the soil, but his 33 acre tract, which, as stated, is now in use for dairy purposes, adjoins the city limits of the City of New Albany, and it does not appear unreasonable to hope that general conditions will improve so that a suburban subdivision can be developed which will take care of McCulloch's creditors within a reasonable time, as provided by the Act which has been invoked. He plans to pay all creditors, principal and interest, in full if allowed to proceed under the Frazier-Lemke Act. But if forced into usual bankruptcy, and his real estate holdings shall be offered for sale under the hammer, it is very doubtful if his property will cancel his in-

debtedness, leaving him penniless as, likewise, broken in health.

"I am not in possession of official rules of practice governing proceedings in inferior federal courts, approved by the United States Supreme Court, and effective in September, 1938, as I have only copies of '75th Congress, 3d Session—House Document No. 460' and '75th Congress, 3d Session—House Document No. 588,' which Senator Minton supplied to me, pertaining to said rules. From these documents I note that by 'Rule 72' provision is made for appeals from a District Court to the Supreme Court under certain conditions. One of these is where a constitutional question is involved, which I dare not assume to exist in this case. But another clause makes reference to the poverty of a litigant, which might apply to the case at bar and if appeal can be taken in the case at bar from the United States District Court, Southern District of Indiana, New Albany Division, to the United States Supreme Court such a proceeding would save costs and hasten the adjudication of this case.

"Do me the kindness to investigate this phase of the matter at bar and place me under deep obligations to yourself by having an official copy of the Rules of Practice governing procedure in the Federal Courts, approved a year ago last month, mailed to me. If any expense be connected with the mailing of such documents, advise me and I shall remit.

"If from a study of the foregoing it is your conclusion that the spirit of the Frazier-Lemke Act alone should control judicial proceedings in

its interpretation and that the letter of the law ought to be disregarded, and you believe an appeal in the McCulloch case would be hopeless, kindly frankly write to me by return mail that such is your conclusion and I shall communicate the same to my client for his future guidance.

"To aid you in reaching your conclusion, I enclose a copy of the entry made in our District Court October 16, 1939.

Yours sincerely,

(Signed) C. R. McBride."

In reply to the foregoing letter, Mr. Lemke expressed the belief that the case at bar is even stronger than the Beach case, counseled that it will be impractical to seek a transfer from the District Court to the Supreme Court and advised that appeal be entered to the Circuit Court of Appeals, which was done. Moreover, Mr. Lemke has generously offered to be of assistance, if needed, before the Supreme Court of the United States.

The ruling of the Special Master, approved by the District and Circuit Courts, that petitioner was not a farmer within the meaning of Section 75 (r) at the date, May 28, 1937, of filing thereunder, was an unjustifiable conclusion of law, arising from the testimony, undisputed, that at the date of filing this petitioner was living on a ten-acre farm, the title to which is vested in Estelle E. McCulloch, petitioner's wife, but petitioner was operating said farm and the dairy stock and poultry, which he owned, thereon and the income

therefrom, due to petitioner's labor and management, together with the value of the hay from the McCulloch-Embry tract, constituted the greater part of petitioner's income in 1937, the year of filing. Moreover, that ruling ignored the facts of petitioner's fee ownership of the 33-acre farm, used for dairying purposes, the unimproved 14-acre tract, used for farming purposes, and an undivided interest in the farm upon which he was reared. Petitioner admits that his farming activities in 1937 was somewhat curtailed from farming activities conducted in 1936, due to the fact that the 14-acre tract could not be farmed that year because of matters beyond petitioner's control as disclosed in Transcript, bottom of page 11 and on page 12.

Since the Special Master, in his conclusions of law in the initial proceedings in this cause, stressed the absence of Mrs. Estelle E. McCulloch, petitioner's wife, to appear and testify, as a most damaging omission, if deemed important, permissible and desired by this Court, said Estelle E. McCulloch will submit a deposition corroborating all material testimony as to petitioner's status furnished at the hearing before the Special Master by himself and his witnesses. Her absence from said hearing was not due to fear that her testimony on any point would be adverse to the farmer status of petitioner, but it was not believed that her testimony would be needed, or if furnished would be more convincing than that of disinterested neighbors. Besides, the appellee could have called Mrs. McCulloch as a witness if counsel for appellee believed her tes-

timony to be important and they did not do so, preferring, seemingly, to note her absence and to cite authorities and cases which give adverse weight to uncalled witnesses who were in a position to know the facts.

The Special Master's conclusion of law and of fact that because some of the personal property owned by petitioner was listed for taxation by petitioner's wife for a number of years, is an error because such listing was done with petitioner's full knowledge and consent in the presence of the deputy assessor, as shown by Transcript, page 64. The property was listed and appraised for taxation, the taxes were fully paid and no tax evasion was attempted. By an oversight, unintentional, and in petitioner's absence a few farming implements, loaned to neighbors, were omitted from the listings on a few occasions.

Your petitioner relies absolutely upon the decision of this Court in the cause entitled First National Bank and Trust Company v. Beach, 301 U. S. 435, for under the logic and conclusions recited therein this petitioner confidently reposes full faith in the righteousness of his cause. Stressing particularly the renting for dairy purposes of the 33-acre tract as fully disclosed by the testimony.

At this time your petitioner wishes to comment upon the fact that his omission to file objections to the rulings of the Special Master was based upon his confidence in the Beach case as being so controlling that the Special Master's conclusions appeared absurd and

petitioner felt confident the District Court would disregard them.

Your petitioner desires to state for the enlightenment of the Court that he has a potential income from the 33-acre farm which he rents to his brother and which is used for dairying purposes, which rental is due and unpaid. (Note Beach case, paragraph 3.)

Petitioner feels that he has been deeply wronged by the fact that more than two years were permitted to elapse after filing cause No. 505, during which period petitioner's farmer status was recognized, involving him in much expense, including an appeal, Cause No. 6500, before this appellee in Cause No. 7228 filed the petition challenging petitioner's farmer status. (See copies marked Exhibit "A" in files of No. 505 and No. 6500.)

From the decision of July 2, 1940, your petitioner quotes as follows, to-wit: "The proceeding is again before us on the debtor's appeal, and again the debtor did not appear at the hearing in this court, either in person or by attorney." From the foregoing quotation this petitioner infers that the failure of himself or his attorney to appear became a matter of vital importance, entering into the final action by the Court, adverse to petitioner's interests, and he begs permission to explain such absence on his part as due to lack of funds, and the absence of his attorney was due to advanced age, 83, and physical infirmities. Petitioner believed that his concise statement (Transcript, p. 90) excused such absence.

The Transcript of Record will disclose the lack of good faith of appellee in initiating the pending proceedings after submitting a proposal to secure title to a part of the real estate pledged for the debt, failing to effect such proposal and thereby seeking title to the remainder of the real estate described in the mortgage. By appellee's failure to carry out his proposal he denied petitioner's composition proposal because the debt to the New Albany National Bank, assignee, constituted a majority in value of petitioner's secured creditors, a well-nigh unanimous number of the creditors having consented to the proposed composition and consent, or cancellation, of the bank debt would complete it. My attorney had advised acceptance of appellee's proposition because the transfer of said real estate, under authority of the District Court, would cancel said mortgage debt and make petitioner's composition and extension proposal operative. (See Transcript, Exhibit "F," page 93.) Thereby obstructing justice.

Complying with paragraph 1, Rule 38, Revised Rules of the Supreme Court, petitioner files herewith printed copy of Transcript of Record, and authenticated copy of the decision entered by the Circuit Court of Appeals July 2, 1940, and stands ready to comply with commands of this Court to the extent of his financial ability; since on July 29, 1940, appellee filed in the Floyd Circuit Court a petition for appointment of a receiver to collect the rent from the real estate involved in this litigation, thereby curtailing petitioner's income from rental of a cottage, which was excluded by the

proposal made by the creditor and accepted by petitioner and wife, as disclosed by Exhibit "F" heretofore recited. Said petition for receiver was heard August 1, 1940, and granted.

WHEREFORE, Petitioner prays that he be granted the benefits of a Writ of Certiorari and for all proper relief.

CHARLES A. McCULLOCH,
Petitioner.

Subscribed and sworn to before me this 15th day of August, A. D. 1940.

CHARLES R. McBRIDE,
Notary Public.

My Commission expires May 8, 1942.

[SEAL]

SEP 30 1940
CHARLES ELMORE CROP
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 452.

CHARLES A. McCULLOCH, Farmer-Debtor.
No. 506. In Bankruptcy.

CHARLES A. McCULLOCH, Appellant,
vs.
WILBUR L. LOFTUS, Appellee.

DECISION ENTERED JULY 2, 1940.

PENDING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S BRIEF.

CHARLES A. McCULLOCH,
Petitioner.

C. R. McBRIDE,
New Albany, Ind.,

HON. WILLIAM LEMKE,
Washington, D. C.,
Counsel for Petitioner.

WHITEFIELD-SCOTT CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 452.

IN THE MATTER OF
CHARLES A. McCULLOCH,
Farmer-Debtor.

CHARLES A. McCULLOCH,
Petitioner,

v.

WILBUR L. LOFTUS,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Seventh Circuit, Chicago, Illinois.

Entered on the Docket September 20, 1940.

PETITIONER'S BRIEF.

HISTORY.

This petitioner filed his initial petition and schedule as a Farmer-Debtor under the Frazier-Lemke Moratorium Act of the Congress May 28, 1937. No. 505. In Bankruptcy.

July 16, 1937, a second schedule was prepared by petitioner's former attorney, Charles Fox, son of Special Master Wilmer T. Fox, from which schedule the LaFollette Real Estate Sale's Contract was omitted

as an asset on the advice of said attorney who stated that petitioner's rights had expired. Which schedule was filed July 20, 1937. Said attorney Fox withdrew from the case July 16, 1937, and petitioner having learned that his rights under the LaFollette contract of January 2, 1930, had not expired he attempted to file a third schedule August 7, 1937. Conciliation Commissioner, Robert C. Bulleit, was attorney for LaFollette in the proceedings to annul the contract and when Bulleit's successor, Charles P. Tighe, was appointed, May, 1939, the discovery was made that the LaFollette schedule had not been placed of record and said third schedule was filed shortly thereafter (see last two lines of Par. 1, R. 3).

For a period of more than two years after filing as a Farmer-Debtor, aforesaid, the farmer status of petitioner was not legally challenged, though four attorneys, including the Conciliation Commissioner, whose clients had been restrained by the proceedings under No. 505 had discussed the matter at the advertised meeting of creditors held August 7, 1937, though petitioner welcomed them to do so at said meeting.

STATEMENT OF PENDING CASE.

In April, 1939, respondent, Loftus, discussed with petitioner's attorney, Mr. McBride, the matter of purchasing from the Receiver of the New Albany National Bank the McCulloch note asset, which is secured by mortgage on real estate, proposing that if he, respondent, became the creditor he would, with the approval of the District Court, accept a deed from debtor for the

business part of the mortgaged real estate and release the mortgage which would leave the title to the part of the real estate which is improved by a frame cottage vested in petitioner and free from said mortgage lien. Upon the advice of said attorney, petitioner and his wife executed an acceptance of said proposal (See "F" R. 93). This proposal, if it had been completed, would have given petitioner's composition proposal a majority in values as well as a majority in number of petitioner's creditors because this claim constituted a majority in values of all secured claims, for which reason Attorney McBride advised acceptance of respondent's proposal.

NATURE OF PENDING CASE.

The pending cause was initiated by respondent, praying that petitioner's application for relief under the Act in question, No. 505, In Bankruptcy, which petitioner had filed May 28, 1937, as heretofore stated, be dismissed.

On June 9, 1939, respondent acquired the status of a creditor of petitioner by purchase and assignment of the said McCulloch asset from the Receiver of the New Albany National Bank, mortgagee, permission to make the sale and transfer having been granted by the department in Washington, D. C.

On June 27, 1939, respondent filed his verified motion attacking petitioner's farmer status. But in the meantime respondent had made no attempt to fulfill his proposal though petitioner and his wife were ready

at all times to complete the transaction. The same date respondent's petition to dismiss was referred by the District Court to Wilmer T. Fox, Jeffersonville, Indiana, as a Special Master in Chancery, who was directed to take testimony concerning the same and to report said testimony with his findings of fact and conclusions of law thereon to the Court (R. 2). On July 21, 1939, petitioner filed with the Special Master a motion to dismiss the motion of respondent on the ground that it was not filed in time and on the further ground that the case of *In re McCulloch,* 100 Fed. (2d) 939, which was decided by the Circuit Court of Appeals, 6500, December 22, 1938, precluded a consideration of respondent's motion because of the doctrine of *res adjudicata* (R. 3, 4). Petitioner believes that if said motion to dismiss respondent's motion had been filed in sufficient time with the Judge of the District Court prior to the date of the hearing, July 21, 1939, this case would have been ended at that time for the reason that the Frazier-Lemke Law permits a petitioner to file as a Farmer-Debtor under his oath and there had been no sufficient proof to the contrary submitted prior to July 21, 1939, and it is confidently believed that none was filed that day, nor since.

But on said July 21, 1939, the Special Master heard the evidence and on September 8, 1939, found the facts specially and reported his conclusions of law in favor of respondent (R. 74-81). Petitioner objects to the Special Master's conclusions of law in excluding the testimony of honest, truthful, actual farmers as incompetent because they do not qualify as expert wit-

nesses, and in stressing the absence of petitioner's wife from the witness stand as a serious confession of lack of merit in petitioner's farmer status. These farmer witnesses are petitioner's near neighbors, all of whom knew petitioner May 28, 1937, the vital date in this proceeding, and since said date, many of whom have known petitioner all of his life, or their own, and most of them surely qualify as experts on farming activities. The Special Master's intimation that if Mrs. McCulloch had been called as a witness her testimony would have been unfavorable to petitioner's farmer status does grave injustice to Mrs. McCulloch whose loyalty to petitioner and his interests is beyond question. But, as stated in the petition for the Writ of Certiorari, if her testimony shall be appraised as highly important and be desired, it will be cheerfully supplied by deposition if such be permissible.

On the 16th day of October, 1939, the District Court adopted the special findings of fact previously reported by the Master, as heretofore recited (R. 81). Verbal notice was at once given in open court of intention to appeal, and on October 18, 1939, written notice of such intention was filed.

December 29, 1939, an appeal bond was approved and an appeal to the United States Circuit Court of Appeals, Seventh Circuit, Chicago, Illinois, was allowed (R. 81-89).

February 9, 1940, petitioner's concise statement setting out facts believed to be important in the adjudication of the matter at bar was filed (R. 90-93).

February 14, 1940, the record in the District Court was certified to the Circuit Court of Appeals (R. 94).

As fully recited in petition for Writ of Certiorari, Cause No. 7228, the Circuit Court of Appeals entered judgment adverse to petitioner's welfare, July 2, 1940 (R. 113).

AUTHORITY.

Petitioner relies primarily, fundamentally and absolutely upon the rulings of this Court in First National Bank & Trust Company, Trustee, v. Beach, 301 U. S. 435. "A farmer remains a farmer just as a lawyer remains a lawyer," even though his activities have been reduced in his farming life because of sciatic rheumatism and lack of finances.

For emphasis the Court is invited to note the fact that the Beach case recites that he leased a part of his land for grazing and diary purposes. Petitioner asks that the Court take particular notice of the fact that petitioner does the same (R. 16).

Particular attention of the Court is requested to the testimony of Lewis Hartley, R. 58, Noble Smith, R. 44, Peter Roth, R. 44, Fred P. Zipp, R. 54, David Box, R. 40, John Quinn, R. 41, Allie Melton, R. 64, and Martin McCulloch, R. 66.

Petitioner feels assured that the Court will not fail to note that on the cross-examination by counsel for respondent the testimony of all of petitioner's witnesses, with the possible exception of one or two, their

testimony on all points, particularly as to petitioner's farmer status, was strengthened.

Petitioner does not doubt that the Court will note, and disapprove, the frequently displayed unfriendliness of the Special Master toward petitioner throughout the hearing.

Petitioner also assumes that the Court, after consideration of the evidence, will note that the words "preponderance of all the evidence," used in the ruling of the United States Circuit Court of Appeals, Seventh Circuit, No. 7228, should be reversed.

Total of debtor's farming activities for 1940: Amount of cultivation on 14 acres is 11 acres. Received under crop control on the above acres 900 pounds acid phosphate at freight cost. The 10-acre tract on which debtor lives, 4½ acres under cultivation, remaining in pasture. No crop control received. The amount of dairy stock at present is 6 dairy cows, 2 yearling heifers, 2 hogs, 85 laying hens and 130 April chickens. Also harvesting of hay off of McCulloch-Embry tract. The 33-acre dairy farm is still under lease for dairy purposes.

Respectfully submitted,

CHARLES A. MCCULLOCH,
Petitioner.

OCT 22 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 452.

In the Matter of
CHARLES A. McCULLOCH, Farmer-Debtor.

CHARLES A. McCULLOCH, Petitioner,

versus

WILBUR L. LOFTUS, - - Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Seventh Circuit, Chicago, Illinois. Entered under Above Docket Number, September 20, 1940.

PETITION FOR A REHEARING IN ABOVE CAUSE.

CHARLES A. McCULLOCH,
Farmer-Debtor.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 452.

IN THE MATTER OF
CHARLES A. McCULLOCH,
Farmer-Debtor.

CHARLES A. McCULLOCH, - *Petitioner,*

v.

WILBUR L. LOFTUS, - *Respondent.*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Seventh Circuit, Chicago, Illinois. Entered under Above Docket Number, September 20, 1940.

PETITION FOR A REHEARING IN ABOVE CAUSE.

Farmer-Debtor's reasons for filing this verified prayer for a rehearing of his petition for Writ of Certiorari.

In the initial proceedings the Special Master stressed the absence of petitioner's wife being most damaging to him in the case because he allowed all personal property belonging to him to be assessed in her name with the household goods which belonged to her. This was done to avoid two lists of personal property. From the conclusion of law this would all be her property. See Record, pages 64 and 65, Allie Melton as assessor.

The question to be decided was whether petitioner was a farmer at the time he filed under the Frazier-Lemke Act, May 29, 1937. He was a farmer and has been a farmer ever since he was old enough to do farm work. The year petitioner filed his papers, to-wit, May 29, 1937, he was

farming his wife's farm and had farmed the land known as the McCulloch-Embrey tract, cutting hay from it since 1925 and it remains farm land until it is platted and the plat recorded and offered for sale, which has not been done up to this date. There are about thirty acres in said tract and it has been used as farm land long before purchase by petitioner and was in the city ever since New Albany became a city.

Petitioner also farmed the fourteen acre tract for several years. See (R.) testimony of Peter Roth, page 42, Nos. 21 to 23. Testimony of Arthur Harris, page 50. Testimony of John Bauer, page 51, Nos. 7, 11, 12, 13, 14, 15, 16. Testimony of Fred Zapp, page 56, Nos. 28, 29, 30. Testimony of Martin McCulloch, page 67, Nos. 16 to 20. Testimony of petitioner, page 11, Nos. 89, 90, 91.

The Court of Appeals erred when they upheld the lower Court on the question whether petitioner was a farmer at the time he filed his papers, May 29, 1937, for petitioner cut hay, sold poultry, poultry products, cream, milk and live stock. He farmed the ten acres where he lived and also rented to his brother the 33 acre dairy farm for dairy purposes. See (R.), page 38, testimony of Henry B. Graybrook.

The Court erred when they failed to qualify practical farmers as expert witnesses because they were not subpoenaed as such. In fact they were not subpoenaed at all but offered themselves as witnesses voluntarily.

The greatest reason for farmer-debtor's prayer for a rehearing. The petitioner being under the wrong impression these objections were not answered before the hearing. The respondent's brief in opposition to Writ of Certiorari to the United States Circuit Court of Appeals for

the Seventh Circuit. Some of his reasons are not correct and are not supported by evidence appearing anywhere in the record. In the Summary of Argument in respondent's brief, as follows:

1. Says petitioner had failed to file a copy of record with the petition. Petitioner's reason for not doing so was because it was delayed in the printing, and it was filed with his brief with the proof of service. Also the second petition was filed at the same time. This was filed in plenty of time for respondent's use in making up his reply brief (Letter b). Petitioner did not give reasons but perhaps they were concised too much. Why did not respondent quote Item 2, last paragraph on page 1 and first paragraph on page 2 in petitioner's petition? (Letter C). Petitioner's brief does not refer to cases other than the Beach case (301 U. S. 435) because petitioner relies wholly on it. First National Bank and Trust Company v. Beach, 301 U. S. 435, 812 Ed. 1206, 1208, 5, 13, 14.

Page 2 of petitioner's petition refers to Rule 38, paragraph 5, letter (b). By the fact that important matter involved in the case at bar having never before been before the Supreme Court, but which ought to be ruled upon by the Supreme Court. More than that or has decided a Federal question in a way probably in conflict with applicable decisions of this Court. Where the decision in the lower Court in petitioner's case discriminates against small farmers. Respondent's attorneys have been very active in trying to combine income from labor and income from investments other than farm property. In petitioner's case income from labor for his first seven years in public office was smaller than from his farming interests. The last six years of his public office which ended in 1930 his income from his farming interests was less than his income from

his public office. From 1930 up to the present time the principal part of his income is from his farming activities and not income from investments. The high Court has settled that question in the Beach case, other than farm property. That makes petitioner a farmer within the meaning of Subsection (r) of Section 75 of the United States Bankruptcy Act. Where the petitioner's is like the Beach case. Beach was at one time in the mercantile business and the last several years prior to his filing under the Frazier-Lemke Act, his labor was devoted to farming activities, as petitioner's has been. Beach had leased three-fourths of his farm to tenants; so did petitioner lease part of his farm to tenants. Beach had other non-farming property which he rented and the revenue from this property was credited to him as income from investment and not as income from farm labor activities. But his revenue from his farm property was credited to his farming activities with his labor. This is true of petitioner.

In support of this prayer, note Judicial Code of the Acts of February 13, 1925; Chapter 229, 43 Stat. 936 (Amendments to June 29, 1938, included). See Section 240 (a).

This prayer is not made for delay but in absolute good faith, and a copy hereof has been placed in the mail addressed to counsel for respondent.

CHARLES A. MCCULLOCH,
Farmer-Debtor.

Subscribed and sworn to before me this 18th day of October, A. D. 1940.

CHARLES R. MCBRIDE,
(Notarial Seal) *Notary Public.*

My Commission expires May 8, 1942.

FILED
SEP 20 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 452

IN THE MATTER OF CHARLES A. McCULLOCH, DEBTOR.

CHARLES A. McCULLOCH,
Petitioner,

vs.

WILBUR L. LOFTUS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MARVIN H. TAYLOR,
Kentucky Home Life Building,
Louisville, Kentucky.
ROBERT C. BULLEIT,
TELFORD B. ORBISON,
Union National Bank Building,
New Albany, Indiana.
Counsel for Respondent.

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In the

Supreme Court of the United States

October Term, 1940.

No. .....

In the Matter of CHARLES A. McCULLOCH, Debtor.

CHARLES A. McCULLOCH,

Petitioner,

vs.

WILBUR L. LOFTUS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I.

Statement of the Case.

Inasmuch as petitioner has failed to serve a copy of the printed record on counsel for the respondent, as required by Section 3 of Rule 38 of the Rules of this Court, it will be necessary throughout this brief to refer to the transcript of the record which was filed September 15, 1940, in the United States Circuit Court of Appeals for the Seventh Circuit.

On June 27, 1939, the respondent, Wilbur L. Loftus, filed in the United States District Court for the Southern District of Indiana, New Albany Division, his verified motion to dismiss the petition of the debtor, Charles A. McCulloch, petitioner herein, which was filed by said McCulloch under and pursuant to Section 75 of the United States Bankruptcy Act, on the ground that said McCulloch was not a farmer within the meaning of subsection (r) of said Section 75. (R. 1, 2.) On June 27, 1939, the District Court referred the verified motion to dismiss to Wilmer T. Fox, Jeffersonville, Indiana, as a special master in chancery, who was directed to take testimony concerning the same and report said testimony with his findings of fact and conclusions of law thereon to the court. (R. 2.) On July 21, 1939, the special master heard the evidence and on September 8, 1939 found the facts specially and reported his conclusions of law in favor of respondent. (R. 74 to 81.) On October 9, 1939, respondent filed his motion to confirm the special master's report and, after a hearing thereon, the District Court on the 16th day of October, 1939, adopted the special findings of fact of the master, theretofore filed on September 8, 1939, and at the same time filed conclusions of law to the effect that the debtor was not a farmer within the meaning of subsection (r) of Section 75 of the Bankruptcy Act, as amended, and that respondent's motion to dismiss debtor's petition should be sustained. (R. 74 to 80, 81.) On the same date an order was entered in the District Court in conformity with the said conclusions of law. (R. 81.)

On November 13, 1939, the debtor filed his petition for appeal, together with an assignment of error. (R. 82, 83.) On December 29, 1939, he filed an appeal bond in the sum of $250.00 which was approved by the court. (R. 87, 88.) On February 5, 1940, he filed his praecipe for record on appeal. (R. 88, 89.)

On July 2, 1940, the United States Circuit Court of Appeals for the Seventh Circuit handed down a *per curiam* opinion, which reads as follows:

> "This bankruptcy proceeding was previously before us, on other questions, 100 F. (2d) 939. We reversed an order of the District Court striking real estate belonging to the debtor from his schedules filed in a proceeding under section 75, on authority of *Wright* v. *Union Central Life Insurance Company*, 304 U. S. 502, and remanded the cause for further proceedings. We there called attention to the fact that the record did not disclose that any inquiry was made as to whether the debtor in fact was a farmer as defined in section 75(r) of the Bankruptcy Act.
>
> "The proceeding is again before us on the debtor's appeal, and again the debtor did not appear at the hearing in this court, either in person or by attorney. The sole question raised is whether the debtor was a farmer at the time he filed his petition, and subsequently. The District Court found the facts specially and quite fully, and concluded and decreed that the debtor was not a farmer.
>
> "The findings are supported not only by material evidence but by a preponderance of all the evidence. The findings are not erroneous and we are not permitted to disturb them. The conclusions of law are correct, the decree properly follows them, and it is affirmed."

II.

Summary of Argument.

The respondent submits that the petition of Charles A. McCulloch for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be denied for each of the following reasons:

1. Petitioner has failed to comply with the Rules of this Court in each of the following particulars:

(a) No certified transcript of the record in the case was filed, as required by Section 1 of Rule 38.

(b) The petition does not contain a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ, as required by Section 2 of Rule 38.

(c) Petitioner's supporting brief does not comply with Rule 27, in that it does not contain a subject index, table of cases, or a reference to the official report of the opinion delivered in the Seventh Circuit.

(d) A copy of the printed record was not served on counsel for the respondent, as required by Section 3 of Rule 38.

2. No adequate reasons are given by petitioner in support of his petition for writ of certiorari.

(a) None of the reasons relied upon by petitioner come within the provisions of subsection (b) of Section 5 of Rule 38.

(b) Although petitioner, on page 1 of his brief, gives as his first reason that a constitutional question is involved, nevertheless the record, as well as his brief, shows that the only question involved is one of fact—was petitioner a farmer within the meaning of subsection (r) of Section 75 of the United States Bankruptcy Act, as amended.

Said Section 75, subsection (r), reads as follows:

> "For the purposes of this Section, Section 4 (b) (11 U. S. C. A., Section 22), and Section 74, the term 'farmer' includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a

farmer shall be deemed a resident of any county in which such operations occur."

Act of May 15, 1935, Chap. 114, Sec. 3, 49 Stat. at L. 246, 11 U. S. C. A., Sec., 203 (r).

(c) Inasmuch as the special master and the District Court made findings of fact to the effect that petitioner was not a farmer within the meaning of said subsection (r) of Section 75, and the Court of Appeals held that the evidence was more than sufficient to support said findings, and further inasmuch as the record discloses that there is in fact ample evidence to support these findings, it is submitted that this court will not grant certiorari.

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175, 178, 58 S. Ct. 849.

First National Bank and Trust Co. v. *Beach*, 301 U. S. 435, 81 L. Ed. 1206, 1208.

III.

Argument.

We deem it unnecessary to point out further the failure of petitioner to comply with the Rules of this Court. A casual reading of his petition and brief clearly reveals the fact that he has failed to comply with Rules 27 and 38 in each of the particulars set forth in our summary of argument. This alone would be a sufficient reason to deny his petition for certiorari.

The only question which was involved in the lower courts was whether the petitioner was a farmer within the meaning of subsection (r) of Section 75 of the Bankruptcy Act. As stated by Mr. Justice Cardozo in the case of *First National Bank and Trust Co.* v. *Beach* (1936), 301 U. S. 435, this question is one of fact to be determined by the court and in every case the totality

of the facts is to be considered and appraised. The special master and the District Court found that petitioner was not a farmer—that he was not "personally bona fide engaged primarily in farming operations" and that "the principal part of his income was not derived from farming operations". The Seventh Circuit Court of Appeals held that these findings were supported not only by material evidence, but by a preponderance of all the evidence. Under these circumstances it is submitted that the writ should not be granted, for it is well settled that this court will not grant a writ of certiorari merely to review the evidence or inferences drawn from it. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178, 58 S. Ct. 849.

Of course we suppose that if the evidence as revealed by the record failed to sustain the lower tribunals, that this court would have the power to grant the writ because a review on writ of certiorari is a matter of sound judicial discretion, and if the record failed to disclose any substantial evidence to support the lower courts then it could be said that there was a special and important reason why the writ should be granted. But a review of the record in this case will disclose that the Seventh Circuit Court of Appeals was amply justified in stating that "the findings are supported not only by material evidence but by a preponderance of all the evidence."

At the time petitioner sought the protection of Section 75, on July 20, 1937, he was and ever since has been the owner of ten parcels of real estate in Floyd County, Indiana, to-wit:

(1) Lot No. 3 and the south 27½ feet of Lot No. 5 in Plat No. 63 of Floyd County, Indiana. (R. 6.) This property is located on Vincennes Street in the City of New Albany, Indiana, which consists of a two-story brick building and four-room cottage with a basement, and is

of the approximate value of $25,000.00. (R. 6, 7.) From 1923 to 1928 debtor ran a confectionery business in the brick building and in April, 1928 sold this business to Mr. Joe Williams for $3,500.00 and thereafter rented the two-story brick building to Mr. Williams at a rental of $180.00 per month for five years. On June 1, 1933 Mr. Williams moved and debtor had a dispute with him concerning the back rent, which amounted to $1,800.00, and now has a suit pending against Williams for this back rent and for damages done to the building, which suit is still pending. (R. 7 to 10.) At the time Mr. Williams occupied the brick building the debtor also rented the cottage and part of the time received $40.00 per month and later on received $30.00 per month, and at the present time is receiving $20.00 per month. (R. 8 to 10.) Since 1936 the two-story brick building could have been rented for $136.00 per month if it had been placed in repair. (R. 31, 32.) This property is subject to the first mortgage now held by creditor Loftus in the amount of $13,350.00, together with interest and delinquent taxes. (R. 35.)

(2) Lots numbered 29, 31, 33 and 35 of Plat 63, the same being located on Eighth Street in the City of New Albany. There is one house on the four lots and is being rented at the present time for $8.00 per month. (R. 10, 11.)

(3) Four and one-half acres adjoining the New Albany Country Club property. The Country Club is using this property but is not paying any rent. (R. 11.)

(4) Fourteen acres on McDonald Lane (Survey No. 43 of the Illinois Grant in said county and state). There are no improvements of any kind on this property. It is only partially fenced, has not been plowed since 1936, is now in weeds and has been so for the past three years, and debtor receives no rent or income therefrom. (R. 11

to 14.) Debtor stated he entered into an oral contract in 1938 with George Kaufer to sow barley and lespedeza thereon, said Kaufer to furnish the seed and receive one-third of the crop and the debtor to receive two-thirds of the crop. (R. 12.) However, Kaufer did not plow any of said land in 1938, and up to the time of the hearing of the evidence had done nothing thereon in the year 1939. (R. 12, 13.) Said fourteen acre tract has not been used and has produced no income during the years 1937, 1938 and 1939. (R. 11 to 13.)

(5) An undivided one-half interest in lots numbered 1 and 2 in Plat No. 488 in said city, county and state, subject to street improvement lien and delinquent taxes. This property is located on State Street in said city. At one time this property was owned entirely by the debtor, but about the year 1925 the debtor sold a one-half interest therein to Mr. Earle Embrey and retained one-half interest. This land is within the city limits and a plat has been prepared for the purpose of a subdivision. Debtor and Embrey, as partners, spent a little fortune in laying out streets and grading said land, were instrumental in having the government put a sewer through it, planted shade trees and prepared a plat known as "McCulloch and Embrey", divided the property into eighty building lots and five out-lots, which plat has not yet been spread of record. It is the purpose of debtor and Embrey to sell said lots for revenue purposes, and in preparing the property for sale each partner has spent about $40,000.00, including interest on their money. (R. 13 to 15, 32, 33.)

(6) An undivided one-tenth interest in a forty-four acre farm in said county and state. This is the old homestead in which debtor resided until his mother died in 1928. It is now occupied by debtor's two sisters and he receives no income from his one-tenth interest therein, for the reason that one of his sisters has the right to

receive any income from the property as long as she remains unmarried. (R. 15.)

(7) All that part of the northeast quarter of Section 34, Township 2 south of Range 6 east, which lies north of the Bono Road in said county and state, containing thirty-three acres, except 80 x 160 feet conveyed by deed recorded in Deed Record No. 79, page 497. This is subject to a first mortgage held by Henry Schafer in the amount of $5,500.00, principal and interest, and also subject to delinquent taxes. (See *In re McCulloch—McCulloch* v. *Schafer,* 100 Fed. (2d) 939 (C. C. A. 7th).) This parcel was in the city limits of New Albany until about 1936, but has never been platted. *It is the purpose of debtor to plat this property and sell the lots off and it is by the sale of these lots that he expects to pay off all of his creditors.* This property faces a long road and no streets would be required in platting it. This parcel is now, and for more than four years last past has been, rented as pasture land at $30.00 per month to debtor's brother, Tow McCulloch. Brother now owes debtor $1,335.00 back rent and debtor has never attempted to collect this rent from his brother by bringing suit because of conscientious scruples and has never tried to oust him from the premises. (R. 15, 16.)

(8) Lots 72 and 73 in Plat 353 in said city, county and state. This property is located on Olive and Bono Road in said city and there are no improvements thereon. They are merely vacant lots. (R. 16.)

(9) 1.55 acres in the southwest corner of Township 35, Range 2, on Prospect Street in said city, county and state. This property has no value. (R. 17, 25.)

(10) Lots 64 and 65 in Plat 363 of said city, county and state. This property is located on Indiana Avenue and has but slight value. (R. 26.)

The debtor in his verified amended petition, under oath,

placed the following estimate on the value of the real estate above described:

Parcel No. (1)—Two-story brick building and four room cottage	$25,000.00
Parcels Nos. (2), (3) and (4)—Lots 29, 31, 33 and 35; 4½ acre tract; and 14 acre tract	9,000.00
Parcel No. (5)—Proposed State Street subdivision	22,000.00
Parcel No. (6)—Undivided 1/10 interest in homestead	800.00
Parcel No. (7)—Proposed Bono Road subdivision	25,000.00
Parcel No. (8)—Lots 72 and 73	1,800.00
Parcel No. (9)—1.55 acres on Prospect Street	no value
Parcel No. (10)—Lots 64 and 65 on Indiana Avenue	undetermined
Total	$83,600.00

(R. 77.)

Debtor's wife, Estelle McCulloch, is the owner of a ten-acre tract of land on Hausfeldt Lane in said county and state. (R. 17.) This property, which has a house and barn located on it, was acquired by her through a former marriage. (R. 17, 66.) Since their marriage, eight or nine years ago, they have lived on this ten-acre tract. (R. 17.) In 1938, 9.2 acres were under cultivation—.3 in garden; 4.2 in pasture; 2.6 in corn for grain; and 2.1 in soy beans for hay. (R. 37.) In 1939, .2 of an acre was in garden; 4.2 in pasture; 3.7 in soy beans for hay; and 1 acre in corn for grain. (R. 38.)

Debtor stated that the personal property on the ten-acre tract, and which was listed by him in the schedules attached to his verified petition and consisting of five cows, one heifer, three pigs of the value of $250.00, and a mowing machine, plows, harrow and manure spreader of the value of $300.00, was his personal property. (R. 18, 19.) However, debtor made no return for taxation of any of said

personal property, or of any personal property of any character for that matter, for the years 1936, 1937, 1938 and 1939. On the contrary, all of said personal property was returned for tax purposes in the name of debtor's wife, Estelle D. McCulloch. (R. 18, 19.) William R. Helm, the New Albany Township Assessor, stated that his records for the years 1936 to 1939, both inclusive, disclosed that debtor did not file a personal property schedule for any of those years. (R. 28, 29.) On the contrary, according to Mr. Helm, debtor's wife, Estelle D. McCulloch, filed a personal property list for each of those years; that Estelle D. McCulloch signed the assessment list for each of said years; that in the year 1936 she filed a schedule of personal property for assessment purposes and made oath that she was the owner of the property therein set forth, which consisted of one automobile, $40.00 worth of household goods, two milch cows and three dozen chickens; that in the year 1937 she made out a schedule of personal property, swore to the same and signed it with reference to the personal property which she owned, for assessment purposes, and that said schedule of personal property showed a dog with no value, household goods, five cows, three milch cows and two other cows, and three dozen chickens; that said Estelle D. McCulloch made out, swore to and signed a schedule of personal property for assessment purposes for the year 1938, in which she listed a Buick automobile, $30.00 worth of farming implements, five cows, two heifers and a dozen chickens; and for the year 1939 she made out, swore to and signed a personal property schedule for assessment purposes and listed a Buick automobile, $40.00 worth of farming implements, $100.00 worth of household goods, four milch cows, two other cows and three dozen chickens. (R. 29, 30.) Mr. Helm further stated that while there were quite a few wives who filed personal property schedules he did not

know of any who filed such schedules unless they really, actually claimed the household goods or whatever they were scheduling. (R. 30, 31.) All of said personal property was listed for taxation in said years in the name of debtor's wife—Estelle D. McCulloch—at debtor's request, in his presence, and with his consent. (R. 18 to 22.)

In the years 1938 and 1939 debtor's wife, in order to receive soil conservation payments from the United States Government, signed up for the government soil building program. For the year 1938 she was paid a total of $12.00. The 1939 allotment had not been determined at the time of trial. (R. 35 to 38.)

The ten acre tract of land owned by debtor's wife, Estelle D. McCulloch, and on which she, her father and mother, debtor and their two children reside, was used for garden, soy beans, corn and pasture in the proportions above stated and the balance was occupied by the dwelling and barn. At the time of hearing the evidence there were six milch cows, four calves, a couple of hogs, and a couple hundred chickens on this ten acre tract, which number varied somewhat in the preceding years of 1938 and 1937, but was substantially the same. (R. 18 to 22.) The debtor testified that he milks the cows twice a day, hoes and does different things like that, cuts wood, fixes the fences and sells part of the milk, but that he has been unable to plow for a number of years because of rheumatism. (R. 21, 39, 40, 42, 43, 44, 46, 50, 51, 53, 55, 65, 67.)

Debtor has not kept any record of the income from his real estate holdings, has not kept any record of the earnings on his wife's ten acre tract—either his own, his wife's or their joint earnings. He estimated that the income of the ten acre tract in cash and value of food consumed by the family was $100.00 per month, but he was not able to separate the portion produced by his labors from that

produced by his wife from her labors and from her ownership of said tract. (R. 21 to 24.)

For thirteen years prior to the year 1930 the debtor held, in the order named, the office of Trustee of New Albany Township, Treasurer of Floyd County, and Assessor of New Albany Township. (R. 27.) From 1923 to April, 1928 the debtor was engaged in the confectionery business in the City of New Albany. (R. 8.)

It will thus be observed that the evidence conclusively shows that debtor is not personally bona fide engaged primarily in farming operations. Debtor is not engaged in farming any of the ten pieces of property owned by him. The only property which debtor owns, which in any sense of the word could be classified as farm property, is the fourteen acre tract of land (Parcel No. (4)), which is only partly fenced, has no improvements thereon, has been in weeds for three years and has not produced any income during said period of time. All the rest of debtor's property consists of a business building, residences, vacant lots, a subdivision and certain acreage which he intends to make into a subdivision. He does not own any farm personal property of any kind, and the mere fact that he performs some of the functions of a farmer, such as milking, cutting weeds, gardening and building fences, is not sufficient to qualify him as a farmer within the meaning of Section 75(r). *Sherwood* v. *Kitcher* (2nd C. C. A.) 86 Fed. (2d) 750, cert. denied 301 U. S. 703; *Baxter* v. *Savings Bank of Utica, New York* (5th C. C. A.) 92 Fed. (2d) 404, 406; *Re Noble* (D. C. N. J.) 19 F. Supp. 504. Even if it be assumed that debtor does "farm" the ten acre tract belonging to his wife, yet this operation is on too small a scale and the acreage is not large enough to show that he is in fact a farmer within the meaning of said Section, especially when the nature and character of his real estate holdings are taken into consideration. *First National*

Bank and Trust Co. v. *Beach,* 301 U. S. 435, 81 L. Ed. 1206, 1208; *Swift* v. *Mobley* (5th C. C. A.) 28 Fed. (2d) 610.

The evidence conclusively shows that the principal part of debtor's income was not derived from farming operations. If any income was derived from the operation of the ten acre tract upon which debtor and his wife and children reside, then such income belonged to the wife, inasmuch as she is the owner of this land, as well as the owner of the farm implements and livestock and poultry. He kept no books or records to show what his income was and had no explanation of why no books or records were kept. In the schedules which he filed at the time of filing his petition for compromise and extension of his debts, he placed a total valuation of $83,600 on the ten parcels of property. At the time of trial he claimed to farm only one of these parcels, the fourteen acre tract on McDonald Lane which could not possibly be worth more than $1,600.00. So we have the very significant fact that he is the owner of $82,000.00 of non-farm property, as against $1,600.00 of farm property.

It is impossible for us to understand how petitioner can find any comfort or assistance in the case of *First National Bank and Trust Co.* v. *Beach* (1936) 301 U. S. 435. We deem it unnecessary to point out the factual differences between the instant case and the Beach case, but believe it sufficient to say that the description of Francis E. Beach at page 436 of the opinion is utterly different from that of petitioner McCulloch. Even if it be assumed that petitioner's activities on the ten acre tract belonging to his wife are sufficient to show that he does cultivate the soil, yet it is on too small a scale and the acreage is not large enough to show that he is in fact a "farmer" within the meaning of Section 75(r) of the Bankruptcy Act. As stated by Mr. Justice Cardozo in the Beach case,

at page 439, the debtor must work "an acreage large enough to count".

No federal question is involved. The decision of the Seventh Circuit Court of Appeals is not in conflict with the decision of another Circuit Court of Appeals. An important question of general law has not been decided in a way probably untenable or in conflict with the weight of authority. A federal question has not been decided which is in conflict with the applicable decisions of this court. The lower courts did not depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this court's power of supervision. There is no question involved in the instant case of such gravity or importance as to require review by this court.

Respectfully submitted,

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